In The

Supreme Court of the United States

October Term 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

DENIS MCINERNEY
Attorney for Petitioner
The Great Atlantic & Pacific Tea Company, Inc.
Office and P. O. Address:
80 Pine Street
New York, New York
10005
(212) 825-0100

Of Counsel:
RAYMOND L. FALLS, JR.
WILLIAM T. LIFLAND
THOMAS F. CURNIN
IRA J. DEMBROW
CAHILL GORDON & REINDEL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The decision below is reported at 557 F.2d 971 and reprinted at pages 1a-32a of the Appendix to the Petition for Certiorari ("Pet. App."); it affirmed an opinion of the Federal Trade Commission ("FTC" or "Commission") reported at 87 F.T.C. 962, 1047-73 (1976), relevant portions of which are reprinted at Pet. App. 35a-57a.

The Second Circuit's decision was entered on June 21, 1977 and a timely petition for rehearing or rehearing in banc was denied on August 8, 1977 (Pet. App. 33a-34a). The petition for a writ of certiorari was duly filed on November 7, 1977, and was granted on March 20, 1978 (98 S. Ct. 1483). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1970).

The statutes involved are §§ 2(a), (b) and (f) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. §§ 13(a), (b) and (f) (1976), principally the latter

("§ 2(f)"), and Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1976) ("§ 5 of the FTC Act"). All of these are reproduced at Pet. App. 58a-60a.

QUESTIONS PRESENTED FOR REVIEW

1. Does a buyer who accepts what appears to be the best price offered to him, by a seller who is attempting to meet competition, incur § 2(f) liability unless he can establish that his seller's price was cost justified?

2. Did the court below err in holding that the buyer violated § 2(f) even though:

(a) the buyer was exonerated of charges of unfair or deceptive bargaining,

(b) the competing prices differed by no more than fractions of mills (or one-third of one percent), and

(c) there was no finding that the seller's offer was not cost-justified, was not within the meeting competition defense, or was illegal?

3. Was it error to deprive the buyer of the statutory "meeting competition" defense, and to assign to the buyer the burden of proving cost justification?

NATURE OF PROCEEDINGS

This proceeding is an attack upon an agreement between petitioner The Great Atlantic & Pacific Tea Company, Inc. ("A&P") and Borden, Inc. ("Borden") under which Borden began supplying private label milk and other dairy products to A&P's stores in the greater Chicago area in November of 1965.[1] The FTC's staff investigation commenced the following year, but the complaint was not issued until October of 1971.

[1] There were approximately 235 stores involved, located in Northern Illinois and in neighboring Northwestern Indiana. At that time, these stores were in A&P's Chicago Unit, which was one of 32 "Units", reporting to seven "Divisions" which, in turn, reported to A&P's headquarters in New York.

The charge now before this Court — that A&P knowingly received an unlawful price discrimination in violation of § 2(f) of the Robinson-Patman Act — was Count II of a three count complaint. The first count complained that A&P was guilty of unfair and deceptive practices in conducting the private label negotiations in violation of § 5 of the FTC Act. That charge was sustained by the administrative law judge, who was reversed by the Commission. Count III (also under § 5) alleged price stabilization at the wholesale and retail levels by A&P and Borden; it was dismissed by the trial judge and his ruling was affirmed by the Commission.

STATEMENT OF THE CASE

As the Commission's opinion states: "Although the record in this case is voluminous, exceeding 20,000 pages, the facts are generally not disputed" (Pet. App. 35a).[2] They are summarized below.

Initial Negotiations with Borden

Sometime in 1964, Herschel Smith, A&P's national director of purchases in New York, became aware that the wholesale prices A&P was paying Borden for milk in the New York area were higher than the retail prices at which A&P's competitors were selling milk (A204a-206a).[3] During that year Borden reduced its prices to A&P in New York by a total of some $2,000,000 annually, in part by offering private label products and eliminating services previously supplied (A204a-206a, 550a).

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[2] Despite this, the hearing took a monumental 110 days spread over three years, apparently establishing a "record" for Commission proceedings up to that time.

[3] "A" refers to pages in the Appendix and "FF" to the administrative law judge's Findings of Fact. The Appendix Table of Contents lists testimony alphabetically and chronologically by witness, exhibits in numerical order, and shows the witness through whom and the transcript page at which the exhibits were introduced.

In late 1964, Smith advised A&P's division purchasing directors (including Ira Bartels of the Chicago Division) of his experience in New York and asked them to look into the possibility of similar savings in their respective areas. Bartels relayed this information to Elmer Schmidt, the new Chicago Unit buyer whose job included responsibility, in varying degrees, for the purchase of thousands of items for his unit. The dairymen who dealt with Mr. Schmidt agreed that he was not a knowledgeable dairy buyer (A102a-103a, 178a, 473a).

Since Borden had been A&P's supplier in Chicago for many years, Schmidt asked Borden's sales representative for chain store sales, Gordon Tarr, for a private label quotation for milk and dairy products under whatever conditions would cut Borden's costs as much as possible but at a price which would result in a profit to Borden (A235a, 244a, 573a).[4] In February of 1965, Borden offered lower prices on half of the 22 dairy items which it was then supplying A&P in the Chicago metropolitan (or Chicago-Calumet) area (A104a-106a, 567a-571a).[5] While only those 11 packages were to be sold under

[4] The shorthand expression "private label" is used herein to describe this arrangement, but the concomitant changes in terms of sale were far more significant than any saving that might have resulted merely from the use of a private label. Those changes ultimately included "store-door drop delivery" and "no returns" instead of the previously provided delivery of products into the dairy case, rotation of them there to insure freshness, and taking back outdated or spoiled products at Borden's expense. In addition, products were "preordered" by A&P's stores well before delivery, instead of being ordered from the delivery truck on its arrival. Advertising and merchandising materials and allowances were eliminated, as were special deliveries and demonstrators. Although reductions in price to permit customers to meet their competition were customary (since the dairy had the risk of spoilage), these competitive allowances were also eliminated. Not one of the Borden customers allegedly discriminated against received such spartan treatment.

[5] The eleven products were: quarts, half gallons and gallons of homogenized milk, half gallons of 2% milk, quarts and half gallons of both fortified skim milk and buttermilk, quarts of chocolate milk, pints of half and half and half pints of whipping cream.

the A&P label at reduced prices, all 22 items were to be delivered on the same trucks under drastically reduced service conditions. In May and July, Borden supplemented this offer with new prices on the same products for additional areas within A&P's Chicago Unit. In August, it combined the earlier quotations (making only minor modifications) and submitted a complete private label quotation on the 11 products for the entire Chicago Unit (FF 39, A1084a). Borden claimed that this offer would "save" A&P $410,000 annually if it switched all of its purchases of those items to private label (FF 39, A1084a).[6]

In negotiating with A&P, Borden's salesmen understated their anticipated profit "per point" of product under the proposed new arrangement.[7] They testified that the cost figures they used for purposes of bargaining did not take into account any of the cost savings that would result from supplying A&P, under minimum service conditions, from Borden's new and more efficient Woodstock plant. Instead, they used total historical costs for full service delivery to all customers from Borden's obsolete Chicago dairy plant (A30a-31a, 42a-44a,

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[6] Borden's estimates of the proposed "savings" to A&P were always based on (a) ignoring any increased labor and other costs to A&P, (b) assuming that, despite the switch to private label, A&P's sales volume would remain as high as it had been in the previous year ($5,600,000 on the 11 items), and (c) assuming that Borden's brand label prices would remain at their existing levels. In fact, when A&P went to private label, Borden reduced its brand label prices to precisely those quoted in this first private label offer (*e.g.*, by some 2.5 cents on half gallons). This immediately eliminated the *entire* $410,000 alleged "saving" that Borden was urging on A&P in August of 1965 (A567a-571a, 643a-676a, 833a-834a). Moreover, A&P had increased expenses and lost sales volume when it switched to its own label (A237a-238a, 790a-794a, 799a-801a), so that the projected "savings" proved largely illusory.

[7] A "point" is a quart of milk or rough equivalent in value, such as a pint of cream; thus, a gallon of milk would be four "points". In July, Borden asserted it would make only a $.0019 gross profit "per point" on private label packages in areas outside of the Chicago-Calumet region (A618a). In an earlier similar proposal (at virtually identical prices), Borden indicated that the same profit figure would be $.0009, or half the amount used two months later (A588a).

51a-52a, 78a-79a, 89a). Ralph Minkler (the President of Borden's Chicago Central District to whom Gorden Tarr reported) characterized the cost and profit figures he used in dealing with A&P as "sales tools" designed to persuade A&P of the "tightness" of the Borden quotation and that A&P was "getting a good deal" (A59a-60a, 81a-84a).[8]

Messrs. Bartels and Smith calculated that even a saving of $410,000 would not offset the increased labor and other expenses that A&P would incur in converting to private label and limited service (A200a, 318a-319a). They therefore decided not to accept Borden's offer and asked Schmidt to make inquiries of other dairies (A200-201a, 298a-299a, 642a).

The Bowman Offer

In August of 1965, Schmidt solicited offers from the four other dairies capable of serving the Chicago Unit: Bowman Dairy Company ("Bowman"), Hawthorn Mellody Dairy, Dean Milk Company, and Sidney Wanzer & Sons (A230a-231a, 241a-242a). He succeeded in obtaining only one additional quotation for all of A&P's Chicago Unit business — from Bowman, which was represented by Frank Cannon, its General Manager (A231a, 248a-249a, 687a-707a). Cannon spent two or three weeks working up a detailed quotation with the assistance of Bowman's senior cost accountant and its outside counsel in order to be sure that the offer was in compliance with a decree against Bowman prohibiting Robinson-Patman violations (A454a-457a, 478a-479a, 482a-484a). He testified they all approved the Bowman bid on the basis of cost justification and not based on any "meeting competition" defense, and that Bowman was prepared to make the same offer to others such as

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[8] This testimony by Borden's chief negotiator demonstrates the validity of this Court's suggestion in *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61, 80 n.24 (1953), that a buyer should not be charged with statements by his natural adversary.

Kroger and High Low stores (A467a-470a, 475a, 484a-486a, 494a-495a).[9]

Cannon submitted the Bowman quotation on August 31, 1965. When he and Schmidt went over it together, Cannon explained that Bowman was offering the same reduced prices on all 22 items for private label or for Bowman label products (at A&P's option) since Bowman would have preferred to have its own brand in A&P's stores (A251a-252a, 457a-458a, 461a-462a). He also confirmed that the "markup" in Bowman's offer included a profit in addition to all overhead and other costs (A252a-253a, 462a, 482a, 493a-495a).[10]

The Commission, specifically reversing the administrative law judge, held that the Bowman quotation "was operative and could be compared to the Borden offer" (Pet. App. 36a, n.2; 43a, n.17).

Borden's First Quotation Compared with Bowman's Prices

The prices offered by Bowman were significantly lower than those contained in Borden's quotation. The most important items were quarts, half-gallons and gallons of regular

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[9] Mr. Cannon's testimony was uncontradicted and accepted by the trial judge. At the time he testified, Cannon was general manager of a dairy in Canton, Ohio, where he had not done any business with A&P. Thus (unlike other witnesses to the negotiations) he had no reason to be partial to any side of this controversy. The trial judge, in finding that A&P was not prejudiced by the delay in bringing this proceeding, stated in part that if they had been alive at the time of trial, "the testimony of Mr. Hart [Bowman's outside counsel], like that of Mr. Parmalee [Bowman's senior cost accountant] would have been only supplementary to that of Mr. Cannon who did testify" (FF 210, A1174a).

[10] Mr. Cannon further testified that the Bowman bid did not take into account A&P's willingness to preorder merchandise and to accept a butterfat content of 3.4% (the amount specified in all of the Borden quotations) instead of the 3.5% stated in Bowman's offer, and that further cost savings would have resulted from these adjustments (A462a-463a, 471a-473a, 491a-492a). Dairies commonly remove butterfat from milk and use it in making ice cream, so that butterfat has a recognized market value (A471a-473a, 491a-492a).

homogenized milk in the Chicago-Calumet area.[11] Without taking into consideration any of the other factors mentioned above which made the Bowman bid more attractive, the comparison between the actual prices offered by Borden and Bowman in August of 1965 on these three main items was as follows (A643a, 695a):

	Quarts	Half Gallons	Gallons
Borden Quote	$.1855	$.3430	$.6860
Bowman Quote	$.1696	$.3136	$.6272

A&P's unit buyer, Elmer Schmidt, looked only at the prices quoted for the 11 items on which Borden's offer was stated to yield a $410,000 price reduction, and saw that the Bowman proposal would result in a reduction of $737,000 on that price comparison alone (A772a).[12]

A&P's Reaction and Borden's Response

Borden claimed it had just completed construction of the largest and most modern dairy plant in the world at Woodstock, Illinois, which would produce substantial savings to its customers (A278a-280a). Schmidt was, therefore, surprised at the disparity between the Bowman and Borden prices. Accord-

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[11] A&P's purchases of these three items in that area made up most of the total dollar volume of all A&P's dairy products purchases for the entire Chicago Unit (A643a) and also accounted for substantially all of the allegedly discriminatory sales. Indeed, the court of appeals held that it had "no Robinson-Patman jurisdiction" as to products other than fluid milk (*e.g.*, cottage cheese, fortified skim milk, buttermilk, egg nog, onion dip, sour cream) because these products "were chemically changed from their origin as raw milk by a variety of processes and additions at Borden's Woodstock plant" and the subsequent sales were not "in commerce" (Pet. App. 13a, n.7).

[12] If he had fully analyzed the two bids, he would have seen other advantages in the Bowman offer. These included the availability of additional savings as noted above at p. 7, n.10, and the fact that Bowman would have sold its advertised brand at the same prices; in addition, Bowman was offering further reductions on other packages such as gallons of milk in glass jugs (not one of the 11 items reduced by Borden) at 10 cents a gallon or $100,000 a year under Borden's price (A283a-286a, 305a-306a, 523a-524a, 529a-530a, 942a).

ing to Messrs. Tarr and Minkler, he told them that Borden's offer was "not even in the ball park", "so far out of line it is not even funny", and that if Borden were to eliminate promotions and other assistance valued at $50,000 per year, even that additional savings "would not be a drop in the pocket" (FF 43, A1085a). He then asked whether Borden wished to stand on its previous offer or submit a new offer (A253a-254a).[13]

Borden's representatives testified that these quoted remarks by Schmidt (which were, of course, quite true) were their only clues to the competition they were facing (A68a-70a, 90a-91a, 111a, 123a-125a, 140a-141a). Because they were A&P's supplier, they believed they could retain its business even at a slightly higher price than a competitor might offer (A84a-87a, 143a-145a). After consulting others at Borden, they told Schmidt that they would submit a new quotation at a "saving" of $820,000 per year or double the previous $410,000 (FF 45, 46; A1085a-1086a).[14] He replied: "Now you are in the ballpark" (FF 46, A1086a).

Over a week later, Borden delivered a revised quotation which added two new items—glass gallons of regular and "2%" milk—spreading the "$820,000 savings" among all 13 products. This change was immediately rejected by Schmidt, whose previous comparison of the competing bids was limited to the 11 items initially offered by Borden. In Borden's final bid (delivered to Schmidt on September 21, 1965), the gallon jugs were excluded (A738a-765a), leaving them at the higher Borden brand price.

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[13] This departure from A&P's usual practice of not permitting a supplier to change its offer (A182a-184a, 201a-203a, 301a-302a) occurred because Borden had been a long-standing supplier and its bid (which essentially had not changed since February of 1965) was then seven months old (A253a-255a, 301a-302a).

[14] The $820,000 was roughly half of the $1,600,000 gross profit Borden was then earning on its sales to A&P, while bearing the expense of the services and allowances which were to be eliminated under the new arrangement (A28a-29a, 683a-686a).

Borden's Final Offer Compared With Bowman's Offer

Schmidt eventually told Cannon that there were "so few differences" between the two proposals that A&P had decided not to change suppliers (Cannon, A474a-475a). The fact is that the two were almost identical on the items Borden was offering in private label. The specific prices for the predominant products in the Chicago-Calumet area were as follows (A695a, 785a):

	Quarts	Half Gallons	Gallons
Bowman Quote	$.1696	$.3136	$.6272
Borden Quote	$.1712	$.3124	$.6248

In other words, Bowman was lower on quarts by 1.6 mills while Borden was lower on the half gallon and gallon items by 6/10ths of a mill per quart (or about 1/3 of 1% lower than Bowman's quoted prices). In addition, Bowman was offering the same prices for an accepted, advertised brand with a higher butterfat content and without preordering by A&P, and was offering comparable price reductions on its full line of products.

"Meeting Competition" References

Borden's representatives testified that, when they gave Borden's final offer to Schmidt, they stated that it was submitted in order to meet competition. Mr. Schmidt at first did not recall this but later testified as follows:

> "I am sorry, it is my recollection that they used the phrase 'meeting competition' or 'beating competition' as the reason for asking me to make sure that we would save and keep in our files the competitive bids."
>
> * * *
>
> "Q. What else was said on the subject of competitive bids, if you recall, Mr. Schmidt?
>
> "A. Again, Mr. McInerney, I don't recall specifically, but as I indicated in previous testimony here, I have the feeling that during this period of time they made reference to it, but again, as I indicated, I considered it salesmen's talk. As a consequence, my memory is not sufficient to indicate when and who said it" (A268a).

At the same meeting Schmidt requested a letter stating that the prices being offered A&P would be made available to others, and he understood "that such a letter would be forthcoming" (A260a-261a, 263a-265a, 291a-292a).[15] The letter actually given by Borden to accompany its final private label offer to A&P was dated October 1, 1965 and reads in full as follows:

> "You have our price quotations dated September 21, 1965 for milk, cream and other dairy products for several areas in Indiana and Illinois. We wish to assure you that our prices are proper under applicable law and we are prepared to defend these prices.
>
> "We appreciate your patronage.
>
> "J. G. Tarr, Sales Manager, Chain Store Sales." (A146a-147a, 848a, 882a)[16]

Elmer Schmidt recommended approval of Borden's offer, and Ira Bartels forwarded it to Herschel Smith with the above letter, Bowman's offer, and Schmidt's comparison of the two.[17]

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[15] Borden never advised A&P in writing that it was "meeting competition", nor was that remark communicated by Borden or Schmidt to anyone else at A&P (A187a-188a, 271a-274a). Furthermore, at no time did anyone from Borden ever state that the prices quoted to A&P were *not* cost justified or would *not* be made available to others (Minkler, A88a-89a, 93a-94a; Tarr, 145a-146a; Archer, 182a, 184a-185a, 187a-188a; Schmidt, 277a-278a). Borden's chief negotiator, Mr. Minkler, testified that Borden fully intended to supply private label to other customers on the same terms and conditions that they had offered to A&P (A93a-94a).

[16] The same language was used by Borden in subsequent assurances to A&P regarding other private label prices (A309a-318a, 893a-896a). Borden stated in writing that these words mean "that [Borden's] prices are proper under applicable law to cover any implications that may be required as to availability under the Robinson-Patman Act" (A894a).

[17] Mr. Schmidt had simply compared the prices on the 11 items Borden was reducing, and he did even that incorrectly. The result was that he estimated that Borden's bid would afford A&P "savings" in excess of $143,000 over Bowman's bid (A772a, 842a). The Borden offer he used purported to show savings of approximately $880,000 annually (instead of $820,000), even though Messrs. Minkler and Tarr had told him that figure was incorrect; they explained that an increase in the cost of raw milk had necessitated adjustments in their prices to those shown at p. 10 above in accordance with a formula in the offer (A77a-78a, 261a-263a, 738a-765a, 774a-775a, 780a-789a, 841a-880a) and that those adjustments would reduce the projected

A&P's Acceptance

Borden and dairies generally regarded their net prices to chain store customers as business secrets (Minkler, A87a-88a; Cannon, 470a-471a), and A&P was never advised of Borden's prices to other volume customers (Tarr, A121a; Schmidt, 236a-237a, 289a). In considering the Borden proposal, therefore, A&P had little more than the Bowman offer, Borden's assurances, and its own experience to rely on. Mr. Smith's experience had taught him that a rough guide used by dairies in figuring private label prices was to add 6 cents per quart to the published price of raw milk—2 cents for packaging, 2 cents for delivery and 2 cents for processing, overhead and profit—a formula Borden had applied in New York in 1964 (A204a-208a, 496a-514a). Both the Borden and Bowman bids were close to that rule of thumb (known as the "2-2-2 formula"), although Borden's first offer was well above it.

The decision below repeatedly relies on such assertions as: "A&P knew *for a fact* that the final Borden bid was substantially below 'meeting competition' and beat the Bowman bid by a good margin" (Pet. App. 19a, emphasis in original; see also Pet. App. 17a). Since that conclusion is based on a single snippet of Smith's testimony concerning Schmidt's superficial comparison of the two bids, we quote that testimony in context below:

> "Q. Now did you compare at that time the Bowman prices and the Borden unit prices on the various products? In other words, you had two bids, two quotes, before you and did you look to see what the prices were per quart, half gallon and gallon on each of those quotations and compare the two of them?
>
> "A. I observed that the Bowman and Borden quotations were very close to each other, that the gallons and

"savings" by $60,000 to the promised $820,000. At the time he approved the Borden offer, Mr. Smith was unaware of this and of the other differences between the two offers as a result of which Bowman's was equal to or lower than Borden's (A526a-527a, 942a).

half gallons were quite close. The quart, as a matter of fact, that Bowman was lower than Borden, and on the half gallons and gallons the difference was almost infinitesimal, it was so small.

"Q. And even though the difference may have been infinitesimal, you at that time decided to accept the Borden quotation, is that right?

"A. That is right. The document itself looks to be a much more attractive, considerably more attractive offer.

"Q. Which document, sir?

"A. The document that Mr. Bartels sent with this letter [the comparison prepared by Mr. Schmidt] shows that the Borden offer is substantially better than the one from Bowman.

* * *

"Q. And yet, if I understood you correctly, comparing the unit prices, the difference was infinitesimal at best?

"A. Yes.

"Q. Now—

"A. It was a matter of mills. Maybe 'infinitesimal' isn't a good word there. It was small, mill differences." (A215a)

The aptness of Mr. Smith's spontaneous testimony that the difference between the two offers was a mere "matter of mills" is clear from the above figures themselves, which have never been disputed. Indeed, as we have seen, the actual differences were even smaller or non-existent. After receiving approval from A&P's legal department, he authorized the acceptance of the Borden offer, and the arrangement went into effect on or about November 1, 1965. Within a year of that date, A&P's Chicago Unit had switched over to private label almost all of its purchases of products being offered by Borden in private label.

In April 1971, while Borden was still supplying it, A&P again solicited offers for its Chicago area dairy business and received lower prices from two other Chicago dairies, Dean

Milk and Spinney Run. Accordingly, in February of 1972, A&P terminated Borden as a supplier in the Chicago area. By the time the hearings before the Commission commenced in 1973, Borden had little incentive to help A&P reconstruct Borden's 1965 costs.

SUMMARY OF ARGUMENT

This case raises the basic issue of whether a buyer may accept the lowest price offered by competing sellers without incurring Robinson-Patman Act liability. The ruling below would require the buyer to forego the bargain *unless* he can prove, to the Commission's satisfaction, that any difference between the seller's price to him and to others is justified by the seller's cost savings in dealing with him. If that ruling is allowed to stand, the results would be to make it illegal for a purchaser to solicit competitive bids and accept the lowest offer, to restrain bargaining by buyers and competition among sellers, to deprive consumers of the benefits of both, and ultimately to stabilize prices at higher levels.

The Commission, in reversing the trial judge's finding that A&P's conduct violated § 5 of the FTC Act, concluded that it would be "contrary to normal business practice and . . . contrary to the public interest" to impose on a buyer a duty to disclose the terms of a competitive bid or to refrain from accepting the lower offer (Pet. App. 38a-39a). Yet that is the practical effect of the Commission's application of § 2(f) to the same conduct, with results which are anticompetitive and against the public interest for the very reasons stated by the Commission itself (Point I).

Section 2(f) makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price" prohibited to a seller and having anticompetitive effects. In *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61 (1953), this Court expressed concern that expansive enforcement of § 2(f) might "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at

63). It held that a buyer is not liable under § 2(f) unless he accepts a discriminatory price which is (i) not "within one or more of the 'defenses' available to sellers", such as cost justification or meeting competition (346 U.S. at 71), and (ii) "known by him [the buyer] not to be within one of those defenses" (346 U.S. at 74). Thus the threshhold requirement for buyer liability is that it is dependent upon seller liability not present here (Point IIA).

The decision below is not only inconsistent with *Automatic Canteen* and with the Commission's own ruling under § 5 of the FTC Act, it is inconsistent with virtually all of the rulings of the other circuit courts on the meeting competition defense. An objective comparison of the two bids shows that the Bowman bid was equivalent to or lower than the Borden bid. But even if the Borden bid was marginally (*i.e.*, no more than 1.5%, accepting the FTC's figures) lower than Bowman's offer, rather than merely "meeting" it, an exact matching of the competing offer is not necessary; the meeting competition defense remains available to a seller who makes a better offer in good faith, as other courts have consistently held. Thus Borden's offer was within that defense, and A&P should have been allowed to assert it (Point IIB).

The court below concluded that because A&P *believed* that Borden's bid was lower, A&P was "properly deprived" of the shelter of the "meeting competition" defense (Pet. App. 22a, 42a), citing *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). The *Kroger* case held that a buyer could not rely on the seller's meeting competition defense when the buyer had fraudulently misrepresented the competition the seller was facing. The case thus created a "lying buyer" exception to this Court's rule that § 2(f) liability is entirely derivative from § 2(a) liability. In the *Kroger* court's own words, "[t]he controlling point here is . . . the *misrepresentation*" (438 F.2d at 1378, emphasis in original). Even if that decision were correct (as to which we submit that the same injunctive result should instead have been reached under

§ 5 of the FTC Act), it is clearly inapplicable to this case of a "silent buyer" exonerated of any deceptive practice (Point IIC).

Finally, the court below erred in holding that the FTC did not have to show that Borden's prices to A&P were not cost justified and in holding A&P liable without any finding of lack of cost justification. The precise issue in *Automatic Canteen* was whether the buyer has the burden of proving cost justification where (as here) the methods by which he is served, or the quantities in which he buys, differ from those of his seller's other customers. In such a case, this Court held that it is the Commission which must "show that such differences could not give rise to sufficient savings . . . to justify the price differential" (346 U.S. at 80). The ruling below places that burden on the buyer (the party least likely to be able to satisfy it), and makes the cost justification defense unavailable, as a practical matter, in a § 2(f) case because of the difficulties inherent in a buyer's proving costs which would be difficult enough for the seller himself to prove (Point III).

Each of these key rulings, we submit, endangers the robust bargaining between buyer and seller (and particularly buyers dealing with the monolithic pricing structure of powerful sellers) which this Court sought to foster in the *Automatic Canteen* case. The rationale of that decision has been warmly endorsed by courts and commentators for 25 years and should not be abandoned now. To do so would be a great disservice not only to the business community but to the public at large.

ARGUMENT

I.

THE DECISION BELOW RESTRAINS COMPETITIVE BUYING CONTRARY TO THE PUBLIC INTEREST.

Section 2(f) of the Robinson-Patman Act makes it unlawful for a buyer to "knowingly" induce or receive an unlawful discriminatory price "where the effect . . . may be substantially

to lessen competition. . ." (Pet.App. 58a). Until the present case, § 2(f) had never been held to prohibit soliciting competitive bids from sellers and purchasing from the lowest bidder—a normal business practice which tends to reduce prices (first to the soliciting buyer and then to others similarly situated) and to curb excesses of powerful sellers. The decision under review, however, challenges that normal business practice. It squarely presents the question of whether a buyer who has made no material misrepresentation may solicit bids and accept in silence the lower of two prices competitively offered.

In dismissing the deceptive practices charge against A&P under § 5 of the FTC Act (admittedly "based on the same conduct" as the § 2(f) count, Pet. App. 5a) the Commission held:

> "The imposition of a duty of affirmative disclosure, applicable to a buyer whenever a seller states that his offer is intended to meet competition, is contrary to normal business practice and, we think, contrary to the public interest." (Pet. App. 38a)[18]
>
> * * *
>
> "We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid." (Pet. App. 39a)

The Commission concluded that A&P had not acted improperly because it had no duty of disclosure to Borden (Pet. App. 39a,

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[18] The opinion at this point quoted approvingly from *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965):

> "The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the market place." (Pet. App. 38a)

Since the Commission found A&P innocent of any meaningful misrepresentation, and held that other allegations of peripheral misstatements by A&P were irrelevant (Pet. App. 37a, n.5), we do not examine these charges in detail and refute them here.

n.7). It therefore rejected the FTC Act charge, a decision which the Department of Justice's 1977 *Report on the Robinson-Patman Act* praised as pro-competitive (at pp. 63-64). However, the practical result of the FTC's decision on the § 2(f) count, if it is allowed to stand, would be to impose on buyers a duty to disclose competitive prices, thus requiring them to act in a manner the FTC itself found anticompetitive.[19]

Neither the Commission nor the court below explained why the result condemned as "contrary to the public interest" in Count I was embraced by the FTC in Count II. Both counts invoked the policy of the Robinson-Patman Act in challenging the same conduct, and both sought to impose on the buyer the dilemma of either refusing the better offer, or advising the offeror that it was low so that he might increase his price.

The court of appeals sought to skirt this "seeming inconsistency" by the facile assertion that "A&P's liability under § 2(f) must be independently assessed without regard to any other statute" (Pet. App. 22a). It then affirmed the inconsistency because of its apprehension that, if purchasers could freely choose between competing bids, they might induce "predatory price cutting" by the seller "without his knowledge" (Pet. App. 20a).[20] The situation the court envisaged is "admittedly the rare case" (*ibid.*), and quite contrary to the fears expressed in the Commission's opinion:

> "We recognize the need to curb undue pressure on sellers by powerful buyers such as A&P but do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change

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[19] Commentators have referred to the § 2(f) ruling as ironic, Comment, *Interseller Price Verification and Hard Bargaining: Reconciliation of the Sherman Act, Robinson-Patman Act, and the Forces of Competition*, 46 Ford. L. Rev. 824, 870 (1978), and of dubious validity, H. Shniderman, *Price Discrimination in Perspective* 143 (1977).

[20] It would appear that a low price cannot be "predatory" unless offered by a seller with consciously anticompetitive objectives, and not unwittingly. A low price wrung from a seller by hard bargaining is precisely the kind of price which the antitrust laws were designed to foster.

> would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution." (Pet. App. 38a)

Thus the Commission recognized in Count I (but ignored in Count II) the strong public policy favoring robust bargaining between buyers and sellers, which is an essential element of the competitive climate the antitrust laws were designed to assure. We respectfully submit that the court below erred in making these values subservient to its concern for possible "predatory price cutting" (which was not found to exist in this case, and for which the Sherman and Clayton Acts provide ready remedies, 15 U.S.C., §§ 1, 2, 13a).

In *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61 (1953), this Court foresaw that expansive enforcement of § 2(f) might "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation" (346 U.S. at 63); it stated in part:

> "[P]utting the buyer at his peril whenever he engages in price bargaining . . . must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated." (346 U.S. at 73-74, footnote omitted)

More recently, the Department of Justice's 1977 *Report on the Robinson-Patman Act* (at 63) stated:

> "While this provision [§2(f)] was intended to counteract the power of large buyers to 'coerce' non-justified price discriminations from *smaller* sellers its applicability is general and therefore is restrictive in situations where vigorous bargaining by a buyer is necessary to bring down high prices charged by large oligopolistic manufacturers.
>
> "It is anomalous that a statute designed to protect small businessmen has the effect of governing the competitive relationships between giant companies for the benefit of those with oligopoly selling power." (Emphasis in original)

It would be even more anomalous if conduct of the very kind deemed desirable by the Department of Justice, and

applauded by the Commission in dealing with the FTC Act charge, were at the same time enjoined as unlawful under Section 2(f).

II.

A&P WAS IMPROPERLY DEPRIVED OF THE "MEETING COMPETITION" DEFENSE.

As noted above, there was no finding that Borden would not have had a "meeting competition" defense to any Robinson-Patman charge against it, or that it would have been liable if faced with any such charge.[21] On the contrary, it seems clear that Borden would have had a meeting competition defense which would also have protected A&P but for the novel approach taken below. The court of appeals held that A&P was "properly deprived" of that defense, whether or not it would have been available to Borden, because it found that A&P *believed* it was accepting a substantially better offer.

The order entered here is indeed a drastic remedy for harboring that "evil thought". Among other things, it prohibits A&P from accepting a price that A&P "knows or has reason to know" is below the price to other purchasers *unless* "A&P can show that said price was granted to it by the supplier to meet a competitor's equally low price, which price A&P reasonably believed to be lawful" (Pet. App. 56a). By requiring equality in competitive bidding, the order reflects the unrealism of the decision on which it is based; both, we submit, are plainly erroneous.

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[21] Section 2(b) of the Robinson-Patman Act (Pet. App. 59a-60a) provides that a seller may rebut a *prima facie* case of price discrimination "by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ." This is "an absolute defense to a charge of violating § 2(a), notwithstanding the existence of the statutorily prohibited anticompetitive effect". *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514 (1963). At the hearings below, complaint counsel's case against A&P was premised on the argument (accepted by the trial judge) that Borden's final proposal was offered in good faith to meet competition (FF 45, A1085a-1086a).

A. The Statute Makes Buyer Liability Dependent On Seller Liability Not Present Here.

Section 2(f) simply states that it is unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section". Thus in order for Section 2(f) liability to exist, the Commission must show that the price the buyer received was in violation of Section 2(a) — which applies, of course, only to sellers — and that the buyer knew or should have known it. In other words, the first element of § 2(f) liability is that it is entirely derivative from § 2(a) liability.[22] Or, as stated more precisely in *Automatic Canteen:*

> "It is therefore apparent that the discriminatory price that buyers are forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act. . . ." (346 U.S. at 70)

It follows that when a defense is available to the seller, it also exonerates the buyer.

> "§ 2(f), which speaks of prohibited discriminations, cannot be read as declaring out of bounds price differentials within one or more of the 'defenses' available to sellers, such as . . . cost differences . . . or bona fide attempts to meet competition, as those defenses are set out in the provisos of §§ 2(a) and 2(b)." (346 U.S. at 71)

Moreover, the "knowingly" requirement of the statute means that the buyer is not liable unless he knew (or should have known) that the seller had no defense:

> "We therefore conclude that a buyer is not liable under § 2(f) if the lower prices he induces are either within

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[22] Congressman Utterback, one of the floor managers of the Robinson-Patman Act, stated at the time of its passage: "This paragraph [§ 2(f)] makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph of the amendment [§ 2(a)]." 80 Cong. Rec. 9419 (1936). The derivative nature of the charge here is underscored by the charging language: "A&P knew or should have known that such prices constituted discriminations in price prohibited [to the seller] by subsection (a) of Section 2 of the Clayton Act. . . ." (Complaint, ¶ 13; A7a).

> one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." (346 U.S. at 74)

In *Mid-South Distributors* v. *FTC*, 287 F.2d 512, 517 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961), referring to both the cost justification and meeting competition defenses, the Fifth Circuit stated:

> "[I]n a § 2(f) proceeding it is a part of the Commission's burden of going forward with the evidence to show that the buyer *knew* that the seller could *not* justify the price differential under either one or both [of these two defenses]." (Emphasis in original)

See also FTC v. *Simplicity Pattern Co.*, 360 U.S. 55, 65 n.6 (1959).

With the exception of this case and *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), discussed below, the courts, the co-author of the Robinson-Patman Act, and other writers on the subject including even the Commission itself, are all in accord as to the derivative nature of Section 2(f) liability.[23]

B. Borden's Bid Was Plainly Lawful Under the Meeting Competition Defense, Which A&P Should Have Been Allowed to Assert.

This Court, in the landmark case of *FTC* v. *A.E. Staley Mfg. Co.*, 324 U.S. 746; 759 (1945), established the principle that a seller need only show that he offered his price "in good faith to meet a competitor's" in order to establish the meeting competition defense. As the 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws* (at

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[23] *E.g.*, *Texas Gulf Sulphur Co.* v. *J. R. Simplot Co.*, 418 F.2d 793, 803-05 (9th Cir. 1969); *American Motor Specialties Co.* v. *FTC*, 278 F.2d 225, 229 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); W. Patman, *Complete Guide to the Robinson-Patman Act* 157 (1963); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 421, 447 (1962); Scher, *New Directions in Buyer's Liability Under the Robinson-Patman Act*, 39 ABA Antitrust L.J. 884, 887 (1970); and *Sears, Roebuck & Co.*, 66 F.T.C. 371, 376, 378 (1964).

183) expressed it: "The Committee further believes that a seller should not be forced to meet a competitor's equally low price to the last fraction of a cent."

The commentators agree that to require an exact matching of competitive bids is commercially unrealistic and economically unsound.[24] Furthermore, with the sole exception of this case, those appellate courts which have had occasion to consider the subject have uniformly held that the meeting competition defense is available even to one who makes a better offer, provided that he acted in good faith. *International Air Industries, Inc.* v. *American Excelsior Co.*, 517 F.2d 714, 726 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Jones* v. *Borden Co.*, 430 F.2d 568 (5th Cir. 1970); *National Dairy Products Corp.* v. *FTC*, 395 F.2d 517 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968); *Callaway Mills Co.* v. *FTC*, 362 F.2d 435 (5th Cir. 1966); *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).[25]

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[24] "Any chipping away at the availability of the 'good faith meeting competition' defense simply lends the sanctions of the Patman Act to encourage resistance to price competition." Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 Nw. U.L. Rev. 173, 178 (1962). "Denying the option to shade competitive prices necessarily forecloses fully active price competition." Kuenzel & Schiffres, *Making Sense of Robinson-Patman: The Need to Revitalize its Affirmative Defenses*, 62 Va. L. Rev. 1211, 1249 (1976). "An individual seller can never know the highest price that will secure a marginal sale, thereby 'meeting' competition." Cooper, *Price Discrimination Law and Economic Efficiency*, 75 Mich. L. Rev. 962, 977 (1977).

[25] Earlier Second Circuit and FTC decisions held the same view. *Samuel H. Moss, Inc.* v. *FTC*, 155 F.2d 1016 (2d Cir. 1946, per curiam); *Kohner* v. *Wechsler*, 477 F.2d 666, 672-73 (2d Cir. 1973; Timbers, J., concurring); *Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963). *See also Beatrice Foods Co.*, 76 F.T.C. 719, 811-12 (1969); on appeal to the Sixth Circuit, *Beatrice* became the *Kroger* case referred to below (pp. 26-27). An analogous *de minimis* doctrine has developed in the cost justification cases in which a cost study reveals a small residue between the price differential and the cost savings. *See United States* v. *Borden Co.*, 1961 CCH Trade Cas. ¶ 69,946 (N.D. Ill. 1961), *rev'd on other grounds*, 370 U.S. 460 (1962).

International Air Industries, Inc. v. *American Excelsior Co., supra,* the most recent of the cases cited above, is illustrative. There, the defendant beat a competing offer of a 14.5% discount by offering a 25% discount, which the competitor met. The defendant then offered a 32.5% discount, decisively undercutting its rival a second time. The Fifth Circuit held that the defendant's response was within the meeting competition defense. In the instant case, the competing prices were within "a matter of mills" or about 1/3 of 1% of each other (see p. 10 above). The maximum total difference between the two bids, as asserted by the Government, was "nearly $83,000 in annual savings" (Brief in Opposition, p. 4) or only 1.5% of the $5,600,000 which A&P was then paying Borden annually for the 11 items to be reduced in price (and less when compared with all of the Chicago Unit's dairy purchases). While even that difference may well have been illusory, under the standards applied in the above cases, it surely was no bar to the "meeting competition" defense here.

Against this background, the decision below is, to say the least, perplexing in its conclusion that: "While Borden may well have been *under the impression* that the terms of its final offer merely met the Bowman bid, A&P knew *for a fact* that the final Borden bid was substantially below 'meeting competition' and beat the Bowman bid by a good margin" (Pet. App. 19a, emphasis in original). In so stating, the court simultaneously conceded the meeting competition defense to Borden and then denied it to A&P because of its supposed state of mind—*i.e.,* a belief that it had accepted the lower offer, which was the only basis for the court's assertion that A&P knew "*for a fact*" something clearly not a fact.

When competing offers involve different commodities, services and allowances, a valid comparison requires more than just setting the quoted prices side by side. For example, in *Harbor Banana Distributors, Inc.* v. *FTC,* 499 F.2d 395 (5th Cir. 1974), the Fifth Circuit found it necessary to consider the different methods of delivery. As *Power Replacements Corp.* v.

Air Preheater Co., 356 F.Supp. 872, 898 (E.D.Pa. 1973), stated: "we must do more than make a superficial dollar and cents comparison between the discriminatory price and the assumed competitive price". So here, a true comparison of the economic value of the two bids requires a more comprehensive analysis, taking account of all of the commodities offered as a package by the competing suppliers (not just the private label items), any differences in the products themselves (*e.g.*, Bowman offering a higher butterfat content), and such other economically significant differences as Bowman's willingness to make the products available at the same price under its own advertised label. A&P's evidence included such a comparison, and it showed that the Bowman offer (the legality of which is not in dispute) was, in fact, better than Borden's (A215a-218a, 221a-223a, 280a-282a, 305a-306a, 515a-529a, 942a-993a). If that is so, then two things necessarily follow: Borden's bid was all the more clearly within the meeting competition rule, and A&P's acceptance of it could not conceivably have caused injury to anyone but A&P.

In any event, the Borden bid was at most marginally lower and would have satisfied Borden's responsibility under Section 2(a). In contrast to the authorities cited above, here the Commission suggested that the defense would only have been available to A&P if Borden's final quote had fortuitously exactly matched the bid submitted by Bowman down to the last fraction of a mill. It stated:

> "We assume, *arguendo,* that A&P can assert the defense if the Borden bid did, in fact, *happen* only to meet the Bowman bid." (Pet. App. 43a, emphasis added)

The Commission's recognition that a precise matching could only occur by happenstance—a result not within A&P's control and not to be expected in real life—underscores the absurdity of making liability turn on the occurrence of such a chance event.

C. The *Kroger* Case, If Correctly Decided, Is Inapplicable Here In Any Event.

In attempting to justify depriving A&P of the meeting competition defense, the court below purported to follow *Kroger Co.* v. *FTC,* 438 F.2d 1372 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971). Both this case and *Kroger* involved the sale of products under private label by a dairy attempting to meet competition, but the similarity ends there. Kroger's buyer was offered a 15% discount by Beatrice Foods Company and *misrepresented* to Beatrice that he had already received an offer at a 20% discount. After further misrepresentations by Kroger, Beatrice eventually offered, and Kroger accepted, prices well below the fictitious 20% discount. (In fact, Beatrice had been the low bidder even before its final — still lower — quotation.) The Commission acquitted Beatrice of a Section 2(a) violation, but found Kroger guilty of a Section 2(f) violation.

On appeal, the Sixth Circuit affirmed. Recognizing its departure from the statutory language and prior judicial interpretation, it stated, in an opinion by Mr. Justice Clark:

> "Kroger . . . [contends] that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of section 2(f) without there being one under 2(a). While ordinarily this may be true—a matter we need not and do not pass upon—it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given 'false price information' to Beatrice as to Broughton's competing bid. . . ." (438 F.2d at 1374)
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> * * *
>
> "The controlling point here is not the 'hard bargaining' nor the 'price levels' but the *misrepresentation* of the [competing] bid, in order to induce a discriminatory price." (438 F.2d 1378, emphasis in original)

In short, the *Kroger* case engrafted a "lying buyer" (or, more precisely, a "fraudulently induced offer") exception on the general rule that § 2(f) liability is wholly dependent on §

2(a) liability.[26] Here, that exception (if indeed it is valid) clearly does not apply. Astonishingly, the court below dismissed the distinction between a buyer's lying (in *Kroger*) and telling the truth (in this case) as "a fine one indeed" (Pet. App. 21a).[27]

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[26] This is confirmed by the Government's brief in opposition to Kroger's petition for a writ of certiorari, which argued:

> "Kroger is not precluded from 'sturdy bargaining' and 'haggling'; it is barred only from affirmatively misrepresenting competitor bids when it has reason to believe that its seller will rely on those misrepresentations and be induced to offer discriminatory prices." (Brief in Opposition, filed July 26, 1971, p. 15)

See also Applebaum, *Fundamentals of Buyer's Violation Under Robinson-Patman Act*, 39 ABA Antitrust L.J. 869, 882 (1970); 40 Cinn. L. Rev. 632 (1971).

While the question need not be decided here, it is petitioner's position that *Kroger* was inconsistent with the plain language of § 2(f) and that the practices shown there should have been enjoined instead under § 5 of the FTC Act (which was not invoked in *Kroger*). *FTC* v. *Sperry and Hutchinson Co.*, 405 U.S. 233 (1972). That approach would harmonize the result in *Kroger* with earlier and later cases holding that an unlawful discrimination "is a condition precedent to a finding of unlawful conduct under § 2(f)". *Harbor Banana Distributors, Inc.* v. *FTC*, 499 F.2d 395, 399 (5th Cir. 1974); *Aviation Specialities, Inc.* v. *United Technologies Corp.*, 568 F.2d 1186, 1191 (5th Cir. 1978); *Rutledge* v. *Electric Hose and Rubber Co.*, 327 F.Supp. 1267, 1276 (C.D. Cal. 1971), *aff'd*, 511 F.2d 668 (9th Cir. 1975).

[27] It said: "the line between affirmative misrepresentation, as in *Kroger*, and the present case, where Borden was told that it was not 'in the ballpark' and that a $50,000 reduction would not be a 'drop in the pocket', is a fine one indeed" (Pet. App. 21a). At the time those statements were made, A&P had a bid from Bowman reflecting savings of $737,000 and a bid from Borden reflecting savings of only $410,000 (A643a-676a, 687a-707a, 772a). Thus, the quoted statements were perfectly true and quite apt.

Moreover, the rationale of *Kroger* does not fit this case for the additional reason that the final Borden bid was truly "responsive to an actual lower bid" (438 F.2d at 1377) which was indisputably well below Borden's initial offer. Perhaps that is why, although the FTC's opinion hinted that it had doubts about whether Borden had a meeting competition defense (Pet. App. 44a & n.19), the Commission made no finding that Borden did not have such a defense.

III.

THE DECISION CONFLICTS WITH THIS COURT'S RULING IN *AUTOMATIC CANTEEN* ON THE COMMISSION'S BURDEN OF SHOWING LACK OF COST JUSTIFICATION.

The court below frankly acknowledged:

> "[T]he Commission did not itself submit a cost study to show the absence of cost justification. A finding of § 2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification. This seemingly anomalous situation is naturally seized upon by A&P. . . ." (Pet. 24a-25a)[28]

Automatic Canteen held that where (as here) the buyer is served by different methods or buys in different quantities than his competitors, in order to make out a *prima facie* case the Commission must come forward with evidence showing *both* that the price was not cost justified *and* that the buyer knew or should have known this fact. The language of *Automatic Canteen* is clear:

> "If the methods or quantities differ, the Commission must only show that such differences *could not* give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, *and* that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings." (346 U.S. at 80, emphasis added)

Despite this, and the failure of Commission counsel to adduce any evidence of lack of cost justification, the decision below improperly required the buyer to demonstrate affirma-

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[28] At another point, the court mistakenly refers to a "Borden cost study . . . criticized by A&P" (Pet. App. 28a-29a). There was no Borden cost study (Pet. App. 51a, n.25) and none was submitted by the Commission (Pet. App. 24a). The administrative law judge who presided at the hearing did make an effort to satisfy *Automatic Canteen*'s requirements by ruling that certain data prepared by Borden's Mr. Malone showed a lack of cost justification. However, the Commission itself disagreed; it "did not consider those figures as a formal cost study" (Pet. App. 24a-25a, n.11) and refused to credit this data as being accurate (Pet. App. 54a, n.31).

tively his seller's cost justification. It did so in several steps. First, the Commission brushed aside A&P's contention that there was no proof of price discrimination because the allegedly injured customers received additional services and allowances, stating that these differences "are more properly considered in connection with the cost justification defense" (Pet. App. 41a). Next, the FTC fashioned a new and intricate set of rules, as follows:

> (a) The Commission need not prove the seller's costs or show absence of cost justification; it need only produce evidence that the buyer was "reasonably aware" that the prices were not cost justified (Pet. App. 46a).
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> (b) The buyer then has the burden of proving the negative that "it did not know or could not reasonably have known that the price differential was not cost justified" (Pet. App. 47a).
>
> (c) Alternatively, the buyer "must submit a cost study if it wishes to prevail, which study generally will be held to the same standard as are cost studies offered by sellers" (Pet. App. 47a).
>
> (d) Thus, "the burden of persuasion as to the issue of whether the prices are, in fact, cost justified *rests with the buyer*" (Pet. App. 48a, emphasis added), and "A&P was unsuccessful in establishing its 'cost justification' defense" (Pet. App. 9a).

These rulings are in plain conflict with the sound logic of *Automatic Canteen.* They assume that the FTC can show that the buyer was "reasonably aware" that prices were not cost justified (and require the buyer to prove the contrary) without adducing any evidence that cost justification was in fact lacking. They then assign to the buyer the burden of showing cost justification, years after the event and under the same severe standard of proof required of a seller who has knowledge of his costs. The result is tantamount to reading the defense out of the statute insofar as a buyer is concerned.

The *Automatic Canteen* decision starts with the premise that it is "apparent that the discriminatory price that buyers are

forbidden by § 2(f) to induce cannot include price differentials that are not forbidden to sellers in other sections of the Act" (346 U.S. at 70); it continues:

> "[A] buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." (346 U.S. at 74)

After thorough analysis, this Court held that counsel supporting the complaint must show *both* lack of cost justification *and* that the buyer knew it, stating that the FTC has "the burden of coming forward with evidence as to costs and the buyer's knowledge thereof" (346 U.S. at 79).[29] In language equally applicable here, the Court found the FTC had not met its burden of proof when:

> "The Commission made no finding negativing the existence of cost savings or stating that whatever cost savings there were did not at least equal price differentials petitioner may have received. It did not make any findings as to petitioner's knowledge of actual cost savings of particular sellers. . . ." (346 U.S. at 66-67)

The Court observed in *dicta* that, where it is shown that the buyer bought in the same quantities as his competition and was served in the same manner but at a substantially lower price — and that he knew those facts — that evidence may be sufficient for a *prima facie* 2(f) case (346 U.S. at 80).[30] In *Automatic Canteen*, however, the methods by which the buyer was served

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[29] Justice Douglas' dissent in *Automatic Canteen* stated: "The Court's construction [of § 2(f)] not only requires the Commission to show that the price discriminations were not justified; it also makes the Commission prove what lay in the buyer's mind" (346 U.S. at 85).

[30] While the facts here are quite different, we submit that the court below misinterpreted *Automatic Canteen* on this point as well. It stated: "Our reading [of the case] does not, however, support the proposition that the Commission must, in all cases, show as part of its *prima facie* case that the prices induced or received by the buyer were not in fact cost justified" (Pet. App. 25a). On the contrary, we read the *dicta* there as saying—not that a showing of absence of cost justification may sometimes be dispensed with—but only that the showing may sometimes consist of something other than a formal cost study (as, for example, when the favored buyer was served in exactly the same way and in the same volume as its competitors so that cost differences could not exist).

differed from his competitors' terms of service. In such a case, even though the buyer knows that he is receiving a substantially lower price (in *Automatic Canteen*, it was up to 33% less), the Court ruled that Commission counsel must nevertheless demonstrate *both* that the price differential was not cost justified *and* the buyer's knowledge of that fact.

There was here abundant evidence that the methods of service and terms of sale to A&P (on both private label and brand label items) differed from those of its competitors. The Commission noted that "there were differences in the way A&P and its competitors were served" (Pet. App. 41a) and that "many of these [competing] stores received more service than A&P" (Pet. App. 48a).[31]

In attempting to justify shifting to the buyer the burden of proving cost justification, the opinions below build on the following fragment from *Automatic Canteen:*

> "[W]e have dealt only with the burden of introducing evidence and not with the burden of persuasion, as to which different considerations *may* apply." (346 U.S. at 82, emphasis added)

The same considerations which were found to require the Commission to carry the burden of going forward also mandate that the Commission carry the burden of persuasion on this issue. "Considerations of fairness and convenience", "the fact that the buyer does not have the required information, and for good reason should not be required to obtain it" (346 U.S. at 78), general antitrust policy, and the specific language of the statute (346 U.S. at 81) require the same result in each instance. The Court's comments on the "elusiveness of cost data" even to the seller himself (346 U.S. at 68), and on the added difficulties faced by a buyer in trying to prove his seller's

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[31] For example, all of the allegedly injured customers selected by Commission counsel in Illinois received full service delivery (A437a-439a, 531a-536a), as did all of the allegedly injured customers in Indiana except one (Wilco Food Center, A531a, 996a) which received merchandising and advertising support, as well as other allowances not accorded to A&P (A357a-361a, 364a-365a, 426a-427a, 881a).

costs (346 U.S. at 69), are applicable *a fortiori* to the buyer's being saddled with the burden of proof. The same is true of the Court's recognition that giving the buyer this burden "would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies" (*Ibid*).[32]

These insights are well illustrated by this case. A&P did not know and could not have known Borden's costs at the time of its purchases because Borden (like sellers generally) considered its costs confidential trade secrets (A1006a).[33] The few figures that Borden passed on to A&P during their negotiations were not intended to show the cost of selling to A&P under the reduced service arrangement, but were actually misleading "sales tools" (*supra*, pp. 5-6). Nevertheless, A&P made a strenuous effort to comply with the extraordinary burden thrust upon it by the trial judge, over eight years after the challenged events. It subpoenaed Borden records and employed accountants who made cost studies with the data then available. The FTC and the court below rejected these studies, pointing out that they "were prepared specifically for purposes of this litigation" (Pet. App. 54a) and were not based on "contempo-

[32] With respect to the relative abilities of the Commission and the buyer to adduce proof as to cost justification, the Court pointedly observed that "the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer. . . . Proof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified" (346 U.S. at 79).

[33] In addition, there was uncontradicted evidence that actual net prices to volume customers were kept secret by Borden and other dairies (A87a-88a, 470a-471a). Indeed, net prices to other customers were also generally unknown because there were such frequent deviations from any published prices as well as individual discounts and allowances (A377a, 427a-430a, 432a-433a, 439a-444a, 447a-451a, 536a-539a, 548a-549a). The sponsors of the Act never intended the buyer to be liable in such circumstances. Senator Robinson stated that "a penalty is not to be inflicted unless the buyer knows what the seller is doing with respect to other customers". 80 Cong. Rec. 6350-6351 (1936).

raneous" observations by accountants familiar with Borden's procedures.[34]

These were, of course, impossible standards for A&P to meet. The outcome here was the predictable result of placing the burden of showing cost justification — whether it is described as one of introducing evidence or one of persuasion — on the party least likely to be able to discharge it, at hearings in which the buyer and seller were in antagonistic positions and which were not concluded until ten years after the agreement under attack.

We are unaware of any other circuit which has attempted to eviscerate *Automatic Canteen* in this fashion. *Alhambra Motor Parts* v. *FTC*, 309 F.2d 213 (9th Cir. 1962), set aside that portion of a Commission order which held that a price advantage given to a cooperative distributor who performed warehousing operations violated § 2(f). There, the Ninth Circuit, relying on *Automatic Canteen*, stated:

> "[T]he Commission regarded petitioners as having the burden of coming forward with evidence that the price differential was cost-justified. In a section 2(f) case, however, the burden is upon the Commission." (309 F.2d at 218).
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> * * *
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> "[S]ince it is established in the evidence that there were these differences in the methods by which manufacturers sold to jobber-members, as compared to independent jobbers, the burden was on the Commission to show that the cost saving could not be commensurate with the price differential." (309 F.2d at 219, footnote omitted).

See also C. Edwards, *The Price Discrimination Law* 512 (1959); Scher, *New Directions in Buyer's Liability Under the Robinson-Patman Act*, 39 ABA Antitrust L.J. 884, 888 (1970); W. Patman, *Complete Guide to the Robinson-Patman Act* 157

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[34] As the court put it: "The A&P [cost] studies were flawed in a variety of respects, many of which were attributable to the preparer's unfamiliarity with Borden's operations in the Chicago area" (Pet. App. 23a).

(1963); C. Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 163 (2d rev. ed. 1959).

The opinions below rely heavily on *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part on other grounds*, 390 U.S. 341 (1968). The evidence there showed that Meyer knew that it was purchasing on the same terms and conditions as its competitors except that it was receiving substantial promotional allowances, found to be tailor-made for Meyer and prohibited by Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d).[35] As we have already seen, in such a case it is sufficient for the Commission to prove the buyer's awareness that he received a substantial price advantage over competitors who were served in the same way, so that no cost justification was possible. Meyer knew that the allowances to it were unique and amounted to "as much as one-third of the regular price" being charged other customers (359 F.2d at 365). Calling the Commission's evidence "weak but not insufficient" the court concluded that "in the circumstances of this case, [it] is enough to satisfy *Automatic Canteen's* requirement of a cost/price comparison" (*Ibid.*).[36]

In sum, nothing in *Fred Meyer* or elsewhere excuses the Commission's failure to adduce any evidence with respect to the cost differences to Borden between serving A&P and serving the allegedly injured customers. This "seemingly anomalous situation", recognized by the court of appeals, of itself requires reversal and dismissal for failure of proof.

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[35] Meyer operated a chain of supermarkets. Each year it conducted a one-month long promotion in which it offered discounts on particular items featured in Meyer's "coupon books". Participating suppliers paid Meyer in cash discounts or other allowances (359 F.2d at 355-56). Not only was there no comparable program for Meyer's competitors, but Meyer's promotional program was "virtually incapable of being offered on proportionally equal terms" (*Id.* at 360).

[36] The Ninth Circuit in *Fred Meyer* did not indicate any intention to modify its earlier decision in *Alhambra*. More recently, it has affirmed a district court's dismissal of a private action under Section 2(f) in which the lower court stated flatly, relying on *Automatic Canteen:* "There is a burden upon the complaining party to show that the price differential exceeded any cost savings the seller may have enjoyed in sales to the favored buyer." *Rutledge* v. *Electric Hose & Rubber Co.*, 327 F. Supp. 1267, 1277 (C.D. Cal. 1971), *aff'd*, 511 F.2d 668, 678 (9th Cir. 1975).

CONCLUSION

The decision below not only improperly shifts the burden of proof to the buyer; it shears him of all defenses by the outright deprivation of any "meeting competition" defense in a competitive bidding situation and by setting impossible standards for his proof of cost justification. It is irreconcilable with *Automatic Canteen* and the other authorities noted above; it unduly restricts bargaining between buyers and sellers, and deprives purchasers and consumers of the benefits of competition. It is, in short, contrary to the public interest.

Accordingly, we urge that this Court reverse the judgment below and remand those unduly protracted proceedings for dismissal of the FTC's complaint.

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Respectfully submitted,

DENIS MCINERNEY
Attorney for Petitioner
The Great Atlantic & Pacific Tea Company, Inc.
Office and P. O. Address:
80 Pine Street
New York, New York
10005
(212) 825-0100

Of Counsel:
RAYMOND L. FALLS, JR.
WILLIAM T. LIFLAND
THOMAS F. CURNIN
IRA J. DEMBROW
CAHILL GORDON & REINDEL